

LUKE W. COLE, California Bar No. 145,505  
CAROLINE FARRELL, California Bar No. 202,871  
BRENT J. NEWELL, California Bar No. 210,312  
Center on Race, Poverty & the Environment  
47 Kearny St, Suite 804  
San Francisco, CA 94108  
415/346-4179 • fax 415/346-8723

NANCY S. WAINWRIGHT, Alaska Bar No. 8711071  
Law Offices of Nancy S. Wainwright  
13030 Back Road, Suite 555  
Anchorage, AK 99515-3358  
907/345-5595 • fax 907/345-3629

Attorneys for Plaintiffs Enoch Adams, Jr., Leroy  
Adams, Andrew Koenig, Jerry Norton, David  
Swan and Joseph Swan

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and  
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

DECLARATION OF LUKE COLE  
IN SUPPORT OF PLAINTIFFS'  
REPLY IN SUPPORT  
OF OBJECTIONS TO  
NORTHWEST ARCTIC  
BOROUGH'S UNDISCLOSED  
WITNESS AND MOTION *IN*  
*LIMINE* TO EXCLUDE  
WITNESS NOT  
TIMELY DISCLOSED  
(Fed. R. Civ. Proc. 26 and 37)

1 I, Luke W. Cole, declare:

2 1. I am over 21 years of age and not a party to this action. I am lead counsel for  
3 plaintiffs.

4 2. Adams moved to exclude the Borough's witness because it is harmed by the  
5 Borough's failure to timely disclose her identity. First, the failure to disclose the witness during  
6 the discovery period precluded Adams from doing any written discovery of the Borough about  
7 the witness and her testimony, such as requests for admission, requests for production, or  
8 interrogatories to discover the underlying facts that would inform her testimony.

9 3. Second, the failure to disclose the witness during the discovery period precluded  
10 Adams from deposing her or other Borough officials (or any other witness, for that matter) about  
11 her testimony.

12 4. Third, the failure to disclose the witness during the discovery period precluded Adams  
13 from listing any documents as exhibits it might have discovered from the Borough that would  
14 contradict, supplement, explain or undercut her testimony.

15 5. Finally, the failure to disclose the identity of the witness during the discovery period  
16 precluded Adams from securing and timely disclosing any witness(es) it might have chosen to  
17 use to rebut the witness's testimony.

18 6. Because the discovery period is now long over, none of these harms are curable. It  
19 would be impossible for Adams to do written discovery of the Borough, and then depositions  
20 following that, followed up by further written discovery, as it has had the opportunity to do with  
21 Teck Cominco in this case.

22 7. The email exchange quoted by the Borough was not about testimony at trial, it was  
23 about which facts all parties were willing to stipulate to, and counsel for plaintiffs was objecting  
24 on relevance grounds to the inclusion of some of the facts proposed by NAB. My mention of  
25 testimony in this email exchange was not in any way a waiver of Adams's right to challenge  
26 defendants' witnesses, as it has subsequently done.

27 8. Because the facts in question were stipulated facts that had to be agreed to by *all*  
28 parties before they could be included, the Borough could not "contest" their exclusion by any

1 party. The Borough's facts were not going to be included, period, because Adams had already  
2 objected to them as irrelevant.

3 9. My position on the Borough's witness has been consisten from the KRPC case to this  
4 one: I supported the Borough filing a witness list and allowing those disclosed witnesses to  
5 testify at trial in the KRPC suit, should the Borough be allowed to intervene and I opposed the  
6 Borough's late disclosed witness here because the Borough did not file a witness list in this case.

7 10. Plaintiffs expert Randolph Fischer is testifying by deposition because, as an elected  
8 member of the Colorado legislature, his schedule precludes him being in Alaska for trial this  
9 summer. Because he was timely disclosed as a witness, and timely filed an expert report, all  
10 parties (including the Borough) deposed Mr. Fischer in 2005. Because he was timely disclosed  
11 as a witness, Teck Cominco had the opportunity to propound extensive discovery to Adams  
12 concerning Mr. Fischer's testimony in 2005, and Adams provided extensive responses to that  
13 discovery in 2005. Mr. Fischer also timely updated his expert report in January 2008.

14 I declare under penalty of perjury that the foregoing is true and correct. Executed this 28<sup>th</sup>  
15 day of February at San Francisco, California.

16  
17  
18 /s/ Luke Cole  
Luke Cole

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February 2008, a true and correct copy of the foregoing Declaration of Luke Cole in Support of Reply in Support of Objections to Northwest Arctic Borough's Witness List and Motion to Exclude Undisclosed Witness was served, via electronic mail, on the below identified parties of record:

Sean Halloran  
Hartig Rhodes  
717 K Street  
Anchorage, AK 99501

Nancy S. Wainwright  
Law Offices of Nancy S. Wainwright  
13030 Back Road, Suite 555  
Anchorage, Alaska 99515-3538

James E. Torgerson  
Heller Ehrman White & McAuliffe LLP  
510 L Street, Suite 500  
Anchorage, Alaska 99501-1959

David S. Case  
Landye Bennett Blumstein LLP  
701 W. 8<sup>th</sup> Ave., Suite 1200  
Anchorage, AK 99501

Thane Tienison  
Landye Bennet Blumstein  
1300 Southwest Fifth Ave, Suite 3500  
Portland, OR 97201

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/s/ Luke Cole

Luke Cole